TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 178.

WESTERN ELECTRICAL SUPPLY COMPANY, PLAINTIFF IN ERROR,

vs.

ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED JANUARY 20, 1904.

(19,209.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 21, 1904.

1 UNITED STATES OF AMERICA:

Supreme Court of South Carolina.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court, in the city of Columbia, this 16th day of January 1904

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of S. C.

2 SOUTH CAROLINA:

I, U. R. Brooks, clerk of the supreme court of South Carolina, do hereby certify that an approved bond for five hundred dollars from the Western Electrical Supply Co. to Abbeville Electric Light & Power Company has been filed in this office in accordance with the order of Hon. Y. J. Pope, chief justice of the supreme court of South Carolina.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of S. C.

3 Know all men by these presents, that we, The Western Electrical Supply Co. as principal, and American Bonding Company of Baltimore, as sureties, are held and firmly bound unto the Abbeville Electric Light and Power Co. in the full and just sum of five hundred dollars, to be paid to the said Abbeville Electric Light and Power Co., its certain attorney, successors, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a sitting of the supreme court of South Carolina in a suit depending in said court, between the Abbeville Electric Light and Power and the Western Electrical Supply Company a judgment was rendered against the said Western Electrical Supply Company and the said Western Electrical Supply Company having obtained from the chief justice of the supreme court of S. C. an allowance of a writ of error to the Supreme Court of the United States upon the filing of a bond in the sum of five hundred dollars. Now that the writ of error to reverse said judgment may issue in accordance with the order of the chief justice and that a citation

may issue citing and admonishing Abbeville Electric Light & Power Co. to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date of the said writ of error.

Now, the condition of the above obligation is such, that if the said Western Electrical Supply Company shall prosecute the writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void;
4 else to remain in full force and virtue.

WESTERN ELECTRICAL SUPPLY CO.
H. B. GILLMAN, *Pres. & Treas.*
AMERICAN BONDING COMPANY OF BALTIMORE,
By W. P. GREENE, *Att'y in Fact.*

Sealed and delivered in presence of—
FRANK B. GARY.
W. B. MARTIN.

Approved by—
Y. J. POPE,
Chief Justice of Supreme Court of the State of South Carolina.

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Abbeville Electric Light and Power Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of South Carolina wherein Western Electrical Supply Co. is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Y. J. Pope, chief justice of the supreme court of South Carolina, this seventh day of January, in the year of our Lord one thousand nine hundred and four.

[Seal Supreme Court of South Carolina.]

Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

Attest: U. R. BROOKS,
[L. S.] *Clerk of Supreme Court of South Carolina.*

6 [Endorsed:] United States of America South Carolina Abbeville Electric Light & Power Co. plaintiff against Western Electrical Supply Co. defendant Citation Frank B. Gary def't's att'y

On this 13th day of January, in the year of our Lord one thousand nine hundred and four, personally appeared W. B. Martin before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Ward Thompson, manager of Abbeville Electric Light & Power Co., and that he also left a true copy in the office of Wm. N. Graydon, att'y for Abbeville Electric Light & Power Co. at 5.10 o'clock on the 13th Jan. 1904, no one being at that time in the office. W. B. MARTIN.

Sworn to and subscribed the 13th day of January, A. D. 1904.
J. L. PERRIN, *C. C. C. P.*

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the supreme court of the State of South Carolina:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of South Carolina, between The Abbeville Electric Light and Power Company, plaintiff, *versus* The Western Electrical Supply Company, defendant, a manifest error has happened, to the great damage of the said defendant Western Electrical Supply Company as by the complaint appears. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of January 1904.

Done in the city of Charleston, with the seal of the circuit court of the United States for the district of South Carolina attached.

[Seal U. S. Circuit Court, District of South Carolina.]

C. J. MURPHY,
Clerk of the Circuit Court of the U. S. for the District of S. C.

Allowed
Y. J. POPE.
Chief Justice of the Supreme Court of the State of South Carolina.

8 [Endorsed:] United States of America South Carolina. Abbeville Electric Light & Power Company plaintiff-respond't against Western Electrical Supply Co., def't-app'l't. Writ of error. Frank B. Gary att'y for Western Electrical Supply Co.

9 THE STATE OF SOUTH CAROLINA:

Supreme Court.

ABBEVILLE ELECTRIC LIGHT AND POWER Co., Plaintiff, *against* WESTERN ELECTRICAL SUPPLY CO., Defendant. } Assignment of Errors.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

The supreme court of South Carolina erred in holding and deciding that sub-division I of section 155 of the Code of Civil Procedure of South Carolina, providing for service of summons upon a foreign corporation, and, the act of the General Assembly of South Carolina, amending the said section of the Code of Civil Procedure by striking out the word "resident" approved the 2nd. day of March, 1839, and also the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business, approved the 2nd. day of March 1897, were valid.

The validity of said section of the Code of Procedure and acts of the General Assembly was denied and drawn in question by the defendant on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

10 The supreme court *court* of South Carolina erred in holding and deciding—

First. That the said acts and section of the Civil Code are not repugnant to or in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that no person shall be deprived of life, liberty or property, without due process of law; and wherein it is provided that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. And that said section of the Code of Civil Procedure and the said acts of the General Assembly did not abridge

the privileges and immunities of citizens or of this defendant as guaranteed by said fourteenth amendment; and that the said section of the Code of Civil Procedure and the said acts did not deprive citizens or this defendant of its property without due process of law contrary to the provisions of said fifth and fourteenth amendments of the Federal Constitution. For which errors the defendant Western Electrical Supply Co. prays that the judgment of the said supreme court of South Carolina herein be reversed, and a judgment entered for the defendant Western Electrical Supply Co., and for costs.

WESTERN ELECTRICAL SUPPLY CO.,
By FRANK B. GARY, *Its Attorney.*

11 THE STATE OF SOUTH CAROLINA:

Supreme Court.

ABBEVILLE ELECTRIC LIGHT AND Power Company, Plaintiff,
against
WESTERN ELECTRICAL SUPPLY COMpany, Defendant.
} Petition for Writ of Error.

Considering itself aggrieved by the final decision of the supreme court in rendering judgment against it in the above entitled case, the defendant herein prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

WESTERN ELECTRICAL SUPPLY CO.,
By FRANK B. GARY, *Its Attorney.*

STATE OF SOUTH CAROLINA, *Supreme Court,* } ss:

Let the writ of error issue upon the execution of a bond by Western Electrical Supply Company to the Abbeville *Abbeville* Electric Light and Power Company in the sum of five hundred dollars.

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

12 [Endorsed:] United States of America South Carolina Abbeville Electric Light & Power Co., pl'ff resp'd't against Western Electrical Supply Co., def't app'l't. Assignments of error and order Frank B. Gary att'y for Western Electrical Supply Co.

13 THE STATE OF SOUTH CAROLINA,
County of Abbeville.

In the Supreme Court, Eighth Circuit, November Term, 1901.

ABBEVILLE ELECTRIC LIGHT & POWER CO., *Plaintiff-Respondent,*
against
WESTERN ELECTRICAL SUPPLY CO., Defendant-Appellant.

Statement of Case.

The above stated case was commenced by the service of the summons and complaint herein upon one George F. Schminke, at Abbeville Court-house, South Carolina, on the 7th day of November, 1900, under the claim of the plaintiff, that the said Schminke was an agent of the defendant.

The summons in the usual form, directed to the defendant, and required that the defendant serve its answer upon plaintiff's attorney within twenty days after the service of the summons and complaint upon the defendant.

The complaint is as follows:

(Title of Cause.)

The plaintiff above named, by its attorney, Wm. N. Graydon, complaining of the above named defendant, alleges:

I. That the plaintiff is a corporation duly chartered under the laws of the State of South Carolina.

II. That the defendant is a corporation duly chartered under the laws of the State of Missouri, but that the cause of action set forth herein arose in this State.

III. That on or about the — day of December, 1899, the defendant sold to the plaintiff an electrical machine for the purpose of generating electricity, known as a 45 K. W. Warren alternator, under a guarantee from the defendant that said machine was
14 free from any and all inherent electrical or mechanical defects.

IV. That the plaintiff commenced operating said machine on the 25th day of February, 1900, the main purpose of the plaintiff, which was known to the defendant, being to furnish electric lights for the city of Abbeville, South Carolina, to which the plaintiff had agreed to furnish forty-two arc lights, of two thousand candle power each.

V. That the said machine failed to come up to the guarantee of the defendant, and has not been able at any time to run more than thirty-three arc lights of two thousand candle power each, and is totally insufficient for the purpose for which it was bought, and is inherently defective.

VI. That in order for plaintiff to carry out his contract with

the city of Abbeville, it will be necessary for plaintiff to put in a new alternator, which will cost at least nine hundred and ninety-five dollars.

VII. That in addition to the cost of the machine the plaintiff has lost four hundred dollars, deducted by the city of Abbeville for failure to furnish lights, which failure was caused by reason of the fact that the alternator failed to come up to the guarantee of the defendant.

That in addition to the above the plaintiff has been damaged in actual business lost during the time that they have been operating said machine to the amount of six hundred dollars additional, making the total loss and damage of the plaintiff the sum of nineteen hundred and ninety-five dollars.

VII. That the defendant has promised time and again to remedy the defect in said machine or to furnish a new one, but they have failed to do so, and by reason of the failure of the defendant to furnish a new machine of the class they promised, the plaintiff has been damaged in the sum of nineteen hundred and ninety-five dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of nineteen hundred and ninety-five dollars, and the costs and disbursement of this action.

Within the time within which the supreme court permitted the defendant to answer the complaint, the defendant served upon the plaintiff's attorney the following notice of special appearance and the following affidavit:

(Title of the Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the defendant herein declines to answer the complaint herein, in accordance with the allowance of the supreme court, as it is advised that by answering it would submit itself to the jurisdiction of this court.

Nevertheless the defendant enters a special appearance for the purpose of objecting to the jurisdiction of this court with the ultimate view of appealing to the Supreme Court of the United States from the final judgment in the case should the same be adverse to the defendant.

Upon the call of the case the defendant will object to the judgment on the ground that the summons has not been served upon the defendant in this State, and this court has not, therefore, acquired jurisdiction of the person or property of the defendant.

The defendant will move the court to set aside the attempted service of the summons on the defendant, on the ground that subdivision 1 of section 155 of the Code, providing for service upon a foreign corporation, and the act of the General Assembly of South Carolina amending the said section of the Code, by striking out the word "resident," approved 2nd March, 1899, are in contravention of

the fifth and fourteenth amendments to the Constitution of the
16 United States, and on the further ground that the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State," approved the 2nd day of March, A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The affidavits upon which this motion will be made will be duly served upon you hereafter.

The defendant will appear for the foregoing purposes, and for no other.

FRANK B. GARY,
Defendant's Attorney.

September 10, 1900.

In due time the following notice and affidavits were served upon the plaintiff's attorney.

(Title of the Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the motion of which you were heretofore given notice will be made upon the accompanying affidavits and the papers in the case.

FRANK B. GARY,
Defendant's Attorney.

September 16, 1901.

(*Affidavit.*)

(Title of the Cause.)

Now comes The Western Electrical Supply Co., defendant herein, and states that it is not now, and never has been engaged in business in the State of South Carolina, and that it has not now nor has it ever had an office or place of business in said State. That the contract between plaintiff and defendant, which is pleaded in the plaintiff's petition, was not made in the State of South Carolina. That said contract, by its terms, was to be performed by defendant in the town of Sandusky, State of Ohio, and that said contract
17 was actually and fully performed by defendant in said town of Sandusky, State of Ohio, by delivering certain merchandise in said town and State of Ohio to the plaintiff. That George F. Schminke, the person upon whom service of summons was had herein, was not at the time of said service and never has been an officer of this defendant nor a director thereof, but had been employed by defendant for a short time as a traveling salesman. That his duties and power were simply and solely to take orders for the

sale of merchandise subject to the approval of this defendant. That he was not employed to make adjustments, and was not sent by defendant in this particular case to make any adjustment or settlement of the controversy between plaintiff and defendant, but while on his route as a saiesman was requested by defendant to go to Abbeville and examine into the running of the machinery in controversy and the complaints of the plaintiff and report the facts to this defendant, and that while said plaintiff was in the town of Abbeville for that purpose, service of summons herein was had on him. Defendant further states that it has a just and meritorious defense to this action.

WESTERN ELECTRICAL SUPPLY CO.
H. K. GILLMAN, *Treasurer.*

STATE OF MISSOURI, }
City of St. Louis. }

H. K. Gillman and R. V. Scudder being severally duly sworn, on their oaths, state that they are and were at the times hereinbefore mentioned, respectively, president and manager of The Western Electrical Supply Company, defendant herein, and that the statements contained in the foregoing are true.

H. K. GILMAN.
R. V. SCUDDER.

18 Subscribed and sworn to before me this 9th day of September, 1901.

GEORGE E. TAYLOR,
[SEAL.] *Notary Public.*

(My commission expires December 28th, 1903.)

Upon the call of the case for trial the defendant, through its attorney, Frank B. Gary, objected to the jurisdiction of the court in pursuance of the notice above set forth, and presented the affidavits above set forth in support of the objection, and set forth its objections in writing as follows:

(Title of the Cause.)

The defendant having entered a special appearance, interposes a demurrer to the jurisdiction of this court on the ground that the defendant has not been brought within the jurisdiction of the court by service of summons upon it in this State, and on the ground that sub-division I of section 155 of the Code of Procedure of S. C., providing for service upon a foreign corporation, and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word "resident," approved 2nd March, 1899, are in contravention of the fifth and fourteenth amend-

ments to the Constitution of the United States; and on the further ground that the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State," approved 2nd day of March, A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

FRANK B. GARY,
Defendant's Attorney.

Oct. 17th, 1901. (Certificate.)

19 The presiding judge, Hon. D. A. Townsend, overruled the objection to the jurisdiction of the court, and made the following order:

(Title of the Cause.)

The defendant Western Electrical Supply Company, through its attorney Frank B. Gary, entered a special appearance for the purpose of objecting to the judgment in this case and demurs to the jurisdiction of this court on the ground that the said defendant is a foreign corporation, has not been served with summons in this State and has not been brought in the jurisdiction of this court, and on the ground that sub-division 1 of section 155 of the Code of Civil Procedure of South Carolina, providing for service upon a foreign corporation, and the act of the General Assembly of the State of South Carolina amending the said section of the Code by striking out the word "resident," approved the 2nd of March, 1899, are in contravention of the fifth and fourteenth amendments to the Constitution of the United States; and on the further ground that the act of the General Assembly of the State of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State," approved the 2nd day of March A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The defendants offered affidavits which are herewith filed. I am constrained to adopt the construction placed upon said statutes by the supreme court of the State, and I hold that the acts and section of the Code referred to in the demurrer are not in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

I hold further that this court has acquired jurisdiction of the person of the defendant.

20 The demurrer to the jurisdiction of this court and the objection to this court rendering judgment are overruled.

D. A. TOWNSEND,
Presiding Judge.

October 7th, 1901.

The defendant thereafter had no further connection with the case.

The plaintiff then offered evidence tending to support the allegations of the complaint, and the jury rendered a verdict for the plaintiff in the sum of $1,995.00, and judgment was duly entered up upon said verdict in accordance with law.

In due time the defendant gave notice of intention to appeal to the supreme court of the State from the order, rulings of his honor, verdict of the jury, and the judgment entered thereon, and in the time prescribed by law served this case and the following exceptions:

1. Because his honor the presiding judge erred in holding that the court of common pleas for Abbeville county had acquired jurisdiction of the person of the defendant, when it appeared that the defendant is a foreign corporation, had not come within the limits of South Carolina to do business, that the contract for the sale of the machinery was not made in South Carolina, by its terms was to be performed in Ohio, and that the only service of process made was upon a person in the State in no representative capacity, with no authority to bind the defendant in any way and only connected with the defendant as a travelling salesman to take orders for the sale of machinery subject to the approval of the defendant.

2. Because his honor the presiding judge erred in not holding that it was beyond the power of the State to enact a law that would authorize service of process upon any agent of a foreign corporation and thus bring such foreign corporation within the jurisdic-
21 tion of the courts of this State, such a law being in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

3. Because his honor erred in holding that sub-division 1 of section 155 of the Code of Procedure of South Carolina, as amended by the act of the General Assembly of South Carolina, approved the 2nd March, 1899, is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States, in which amendments it is provided that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

4. Because his honor the presiding judge erred in holding that the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporation- may do business in this State," approved the 2nd March 1897, is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States. It is respectfully submitted that the said act and especially section 4 thereof, providing that "it shall be a further condition precedent to the right of any such cor-

poration to do business in this State, that it shall be taken and deemed to be the fact, irrebuttable, and part and parcel of all contracts entered into between such corporation and a citizen or corporation of this State, that the taking or receiving from any citizen or corporation of this State of any charge, fee, payment, toll,
22 impost, premium or other money or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State, anything contained in such contract or any rules or by-laws of such corporation to the contrary notwithstanding," abridges the privileges or immunities of citizens of the United States, and deprives the citizen of their property without due process of law, and denies the equal protection of the law.

5. Because his honor the presiding judge erred in not holding that the defendant had not come within the limits of the State of South Carolina, and that the summons in this case had not been served upon it in this State.

6. Because the presiding judge erred in not setting aside the service of the summons, and in not dismissing the complaint; and erred in allowing verdict to be rendered and the judgment entered in this case.

FRANK B. GARY,
Defendant's Attorney.

A true copy:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

23 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1902.

ABBEVILLE ELECTRIC LIGHT & POWER CO., Plaintiff, Respondent,
against
WESTERN ELECTRICAL SUPPLY CO., Defendant, Appellant.

Opinion.

By LE ROY F. YOUMANS, *Acting Associate Justice:*

For a proper understanding of the questions involved in this appeal, a statement somewhat minute of the proceedings is necessary. The action was commenced by service of summons and complaint upon one George F. Schminke, under the claim of plaintiff that Schminke was an agent of defendant, a corporation duly chartered under the laws of the State of Missouri. In the complaint it is alleged that the cause of action set forth arose in the State of South

Carolina, and the other allegations set forth as the cause of action the breach of a contract whereby defendant guaranteed that a certain electric machine for the purpose of generating electricity known as a 45 K. W. Warren alternator sold by defendant to plaintiff in December 1899 was free from any and all inherent electrical or mechanical defects. The complaint alleges also that defendant promised time and again to remedy the defect in said machine or furnish a new one, but failed to do so. Before the time for answering expired the following notice was served on plaintiff's attorney:

24 (Title of Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice that the undersigned hereby enters a special appearance for the above named defendant, and upon the call of this case will move the presiding judge to set aside the service of the summons herein on the ground that the party served with the summons and complaint herein on the seventh day of November 1900 was not an agent of the defendant.

Defendant will appear for the purpose of objecting to the jurisdiction of this court, and for no other purpose.

FRANK B. GARY,
Defendant's Attorney.

November 26th, 1900.

The defendant placed the case upon the docket of the court and the motion was heard before Judge Benet at the February term 1901, of the court of common pleas for Abbeville county.

The defendant offered the following affidavit in support of the motion, viz:

(Title of Cause.)

Now comes The Western Electrical Supply Company defendant herein and states that George F. Schminke the person upon whom service of summons was had herein, at the time of said service was not an officer of this defendant nor a director thereof; that he was simply and solely the traveling salesman for this defendant; that his duties & powers with this defendant were simply & solely to take orders for the sale of merchandise subject to the approval of this defendant in such States as he might be directed by this defendant from time to time. That he had no other powers or duties than these. That he was a resident of the city of New Orleans, State of Louisiana. That this defendant has no office or place of
25 business in the State of South Carolina. That said George F. Schminke was especially sent to the town of Abbeville at the time of said service to examine into the running of the machinery in controversy and report the facts to defendant, and that he was so

sent at the request of plaintiff. That the contract between plaintiff and defendant out of which the alleged cause of action arose if plaintiff has any cause of action, was not made in the State of South Carolina.

WESTERN ELECTRICAL SUPPLY CO.,
Per R. V. SCUDDER, *Gen'l Magnr.*

STATE OF MISSOURI, }
City of St. Louis. }

R. V. Scudder, being duly sworn, on his oath states that he is and was at the time hereinbefore mentioned general manager of The Western Electrical Supply Co. defendant herein, and that the state-m-nt- contained in the foregoing are true.

R. V. SCUDDER.

Subscribed and sworn to before me this 27th day of November 1900 in the city of St. Louis, Mo.

J. B. CARROLL,
[OFFICIAL SEAL.] *Notary Public.*

The plaintiff offered the following affidavit and card and letters in rebuttal viz:

(Title of Cause.)

Personally appeared before me W. N. Thompson, who being duly sworn says: That he is the president of the above named plaintiff. That the letters hereto attached were received from the defendant in due course of mail, and letters, copies of which are hereto at-
26 tached sent defendant. That the card hereto attached was handed deponent by Mr. George F. Schminke when he came to Abbeville representing the defendant in negotiations looking to the settlement of the differences between the plaintiff and the defendant, which resulted in the suit now pending in this court.

W. N. THOMPSON.

Sworn to and subscribed before me this February 21st, 1901.

J. L. PERRIN, *C. C. C. P.*

The following is the card referred to in the above affidavit:

George F. Schminke, Western Electrical Supply Company, electrical supplies, St. Louis.

The following are the letters and copies of letters in their regular order referred to and attached to the affidavit of W. N. Thompson, viz:

ST. LOUIS, *October* 23*rd*, 1900.

Abbeville Electric Light and Power Co., Abbeville, S. C.

GENTLEMEN: Referring to your favor of October 6th which has been held for the writer's return to the city, we notice fully what you have to say, and as ther- is such a marked difference between your report and the factory's report, and as we are put in the position of middle man as sort of a bumper between you and factory, you can readily appreciate our position, and we will defer writing you at any great length, excepting to say that if your position is correct you shall certainly be treated right. We have written our Mr. George F. Schminke who will be in Abbeville now in
27 about ten days and we will get a full report from him, and we have also written the factory fully regarding the matter and enclosed them a copy of your letter and we are satisfied that it will be news to them and we will advise you as soon as we hear from them and we have requested them to write us by return mail fully regarding the matter and we assure you that if your position is correct in this matter and the machine is defective that we will replace it with a machine that will perform in accordance with the contract. We trust you will bear with us until we can get a full and definite report from the factory and a reply to our lett-r to them today enclosing a copy of your letter under answer.

(Signed by defendant.)

The following is the letter of plaintiff in reply to the above:

ABBEVILLE, S. C., *October* 27*th*, 1900.

GENTLEMEN: In reply to your favor of the 23rd inst. we note what you say and would say that we are taking steps to buy a new machine at once for we cannot afford to be delayed any longer in this matter. Now in consideration of what you say in your last about sending your Mr. Schminke to Abbeville by the 3rd proximo we will defer buying the machine above referred to until the 5th proximo, provided you write us at once that your authorized representative will be in Abbeville by the above date with power to act so that we may be assured of a speedy settlement.

(Signed by the plaintiff.)

The following letter in reply to letter of plaintiff follows:

28 ST. LOUIS, *October* 29*th*, 1900.

Abbeville El. Lt. and Power Co., Abbeville, S. C.

GENTLEMEN: Your favor of the 27th inst. to hand and this is simply to acknowledge receipt of your letter and to let you know that we are following the matter up. Before answering your letter we are waiting to have a reply to a telegram we have sent to our Mr. George F. Schminke today asking him to wire us when he would

arrive in Abbeville, and also asking him to advise us by wire where a let-er would reach him, as we want to write him fully regarding the situation at Abbeville, and upon receipt of his reply advising us when he will be able to reach Abbeville we will answer your letter fully. We have no doubt, however, that he will be able to get into Abbeville not later than November 5th, and we think it will be very foolish of you to replace the Warren machine with a machine of another make if you intend trying to operate the other machine under the same conditions as the Warren, and we are very sure that if you will improve the conditions under which you are trying to operate this Warren machine and have your Warren machine fixed up that you will have no trouble with it. We are very sure that under the conditions you are trying to operate you cannot get any machine to give satisfaction, and we doubt if any machine would have stood the racket as long as the Warren machine has. Mr. Schminke is a very competent man and capable of passing on a thing of this kind and can advise you in a very few moments whether or not the conditions under which you are operating are unfavorable, and we trust that you will defer action on this matter until you give us an opportunity to look over the ground for ourselves which we will do when our Mr. Schminke arrives in Abbeville. We
29 will defer writing further until hearing from Mr. Schminke and will notify you as soon as we have his telegram.

(Signed by defendant.)

The next letter is dated St. Louis October 30, 1900 addressed to plaintiff and is as follows:—

GENTLEMEN: Referring to your favor of October 4th in which you enclosed your bill of October 1st against us amounting to $32.60 we return you herewith the invoice and will thank you to kindly hold this with the balance of the papers until final adjustment is made on the account in accordance with the agreement and when final adjustment is made of the account if you are entitled to credit for these items you shall certainly receive them, but we would prefer not dividing the thing up and making an entry now and another entry at the final adjustment, but will simply make one bite of the cherry. Please attach this letter and your bill to the other papers pertaining to this -ettlement and keep all of the papers together so that we can have them at the proper time. This letter was in a basket on the writer's desk during his absence in th- East, and in cleaning up the basket to day he found the letter and he thinks this will be the best way to dispose of the matter temporarily. We have not yet received a telegram from our Mr. Schminke in reply to ours of yesterday asking him when he would reach Abbeville, but we have received a lette- from him which indicates that he -ill be in Asheville N. C. tomorrow, at which time we expect to receive *a* an answer to our telegram and we will *them* notify you just when
30 you can expect Mr. Schminke in Abbeville.

(Signed by the defendant.)

Post script.—We are sending Mr. Schminke some letters in your care which we will thank you to kindly deliver to him when he reaches Abbevil'e.

The next letter is dated St. Louis November 1, 1900 address- to the plaintiff and is as follow-:

GENTLEMEN: Our Mr. G. F. Schminke will be in Abbeville on the 5th inst., and we are writing him fully today regarding the situation there.

(Signed by defendant.)

After argument of counsel for and against the motion his honor Judge Benet signed the following order:

(Title of Cause.)

This case came before me on a motion to set aside the service of summons. The defendant is a corporation under the laws of the State of Missouri, and entered a special appearance through its attorney for the purpose of setting aside the service of summons and of objecting to the jurisdiction of this court. Affidavits were presented by both plaintiffs and defendants as to the capacity in which Geo. F. Schminke, the person, on whom the service was made, was acting.

After argument of counsel on both sides I hold that defendant non-resident corporation could not be brought within the jurisdiction of this court by service of the summons upon the said George F. Schminke, he not being in my opinion an agent in the sense in which "any agent" is used in the Code.

It is therefore on motion of Frank B. Gary, defendant's
31 attorney, ordered, that the service of the said summons upon the said defendant, in the manner above related, be and the same is set aside. It is further ordered that the case be dismissed on the ground that this court has not acquired jurisdiction of the person or property of the defendant.

W. C. BENET,
February 21st 1901 *Presiding Judge.*

Within ten days after the rising of the court the plaintiff duly served notice of its intention to appeal and within thirty days served case and exceptions.

The exceptions are as follows:

1. Because his honor erred in holding that George F. Schminke was not an agent in the sense in which 'any agent' is used in the Code.

2. Because his honor erred in limiting the scope of the words any agent' as used in sub-division 1 of section 155 of the Code of Civil Procedure as amended by the act of 1899 page 42.

3. Because the Code in describing how service shall be made upon

a foreign corporation, having named the president, cashier, treasurer, attorney or secretary and then saying 'or any agent thereof' plainly meant to include ev-ry class of agents and it was error in his honor to hold otherwise.

4. Because it plainly appears from the affidavit of the defendant and from letters written by them that George F. Schminke was the direct representative of the defendant in the very matter out of which the suit arose, and it was error in his honor to hold that he was not an agent in the sense in which the words 'any agent' is used in the Code.

5. Because his honor erred in setting aside the service of
32 the summons herein, the same having been duly and legally made upon an agent of the defendant within this State.

6. Because his honor erred in ordering that the case be dismissed no notice of any such motion having been given the only notice being that a motion would be made to set aside the service of the summons.

7. Because his honor erred in holding that the defendant could not be brought within the jurisdiction of the circuit court by the service of the summons upon George F. Schminke he being as shown by defendant's own affidavit an agent of the defendant.

March 7th 1901.

W. N. GRAYDON,
Appellant's Attorney."

That appeal was heard by this court and its judgment rendered and filed August 5th 1901 "that the order of the circuit judge setting aside the service of summons in this case and dismissing the case for want of jurisdiction be reversed and that the case be remanded to the circuit court for Abbeville county for such further proceedings as may be necessary with leave to the defendant to serve its answer within twenty days after written notice to the counsel who represented the defendant at the hearing of the motion to set aside the service of summons of the filing of the *remittitur* in this case in the circuit court for Abbeville county." The opinion of the court was delivered by Mr. Chief Justice McIver 61 S. C. 361. It is *inter alia* decided that the letters of the defendant used at the
hearing of the motion below fully show that Schminke when
33 served with the summons in this State, was here as the representative of the defendant in the very transaction out of which the controversy arose. That the service upon him in any view that may be taken of the case was good and valid service upon defendant and would be held so to be by the Supreme Court of the United States under their decisions even apart from the South Carolina Code of Procedure.

Within the time within which the supreme court permitted the defendant to answer the complaint the defendant served upon the plaintiff's attorney the following notice of special appearance anthe following affidavit:

(Title of Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the defendant herein declines to answer the complaint herein in accordance with the allowance of the supreme court as it is advised that by answering it would submit itself to the jurisdiction of this court. Nevertheless the defendant enters a special app-arence for the purpose of objecting to the jurisdiction of this court with the ultimate view of appealing to the Supreme Court of the United States from the final judgment in the case should the same be adverse to the defendant.

Upon the call of the case the defendant will object to the judgment on the ground that the summons has not been served upon the defendant in this State, and this court has not therefore acquired jurisdiction of the person or property of the defendant.

The defendant will move the court to set aside the at-
34 tempted *attempted* service of the summons on the defendant on the ground that sud-division 1 of section 155 of the Code providing for the service upon a foreign corporation and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word 'resident' approved 2nd March 1899 are in contravention of the fifth and fourteenth amendments to the Constitution of the United States, and on the further ground that the act of the General Assembly of South Carolina entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business within the State.' approved the 2nd day of March A. D. 1897 is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The affidavits upon which this motion will be made will be duly served upon you hereafter.

The defendant will appear for the foregoing purposes and for no other.

FRANK B. GARY,
Defendant's Attorney.

September 10, 1900

In due time the following notice and affidavits were served upon the plaintiff's attorney.

(Title of the Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the motion of which you were heretofore given notice will be made upon the accompanying affidavits and the papers in the case.

FRANK B. GARY,
Defendant's Attorney.

September 16, 1900

35 (*Affidavit.*)

(Title of the Cause.)

Now comes The Western Electrical Supply Co. defendant herein, and states that it is not, and never has been engaged in business *if* the State of South Carolina, and that it has not now nor has it ever had an office or place of business in said State. That the contract between plaintiff and defendant, which is pleaded in the plaintiff's petition was not made in the State of South Carolina. That said contract by its terms, was to be performed by defendant in the town of Sandusky State of Ohio and that said contract was actually and fully performed by defendant in said town of Sandusky, State of Ohio, by delivering certain merchandise in said town and State of Ohio to the *the* plaintiff. That George F. Schminke the person upon whom service of summons was had herein was not at the time of said service and never has been an officer of this defendant nor a director thereof, but had been employed by defendant for a short time as a traveling salesman. That his duties and power were simply and solely to take orders for the sale of merchandise subject to the approval of this defendant. That he was not employed to make adjustments and was not sent by defendants in this particular case to make any adjustment or settlement of the controversy between plaintiff and defendant but while on his route as a salesman was requested by defendant to go to Abbeville and examine into the running of the machinery in controversy and the complaints of the plaintiff and report the facts to this defendant, and that while
36 said plaintiff was in said town of Abbeville for that purpose service of summons herein was had on him. Defendant further states that it has a just and meritorious defense to this action.

WESTERN ELECTRICAL SUPPLY CO.
H. K. GILLMAN, *Treasurer.*

STATE OF MISSOURI, }
City of St. Louis. }

H. K. Gillman and R. V. Scudder being severally duly sworn on their oaths state that they are and were at the times hereinbefore mentioned, respectively president and manager of The Western Electrical Supply Company defendant herein, and that the statements contained in the foregoing are true.

H. K. GILLMAN.
R. V. SCUDDER.

Subscribed and sworn to before me this 9th day of September 1901.

GEORGE E. TAYLOR,
Notary Public.

(My commission expires December 28th, 1903.)

[SEAL.]

Upon the call of the case for trial the defendant through its attorney Frank B. Gary objected to the jurisdiction of the court in pursuance of the note above set forth and presented the affidavits above set forth in support of the -bjection, and set forth its objections in writing as follows:

(Title of the Cause.)

The defendant having entered a special appearence interposes a demurrer to the jurisdiction of this court on the ground that the defendant has *no* not been brought within the jurisdiction of the court by service of summons upon it in this State, and on the ground
37 that subdivisions 1. of section 155 of the Code of Procedure of S. C. providing for service upon a foreign corporation and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word 'resident' approved 2nd March 1899 are in contravention of the fifth -nd fourteenty amendments to the Constitution of the United States and on the further ground that the act of the General As-embly of South Carolina entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within the State," approved 2nd day of March A. D. 1897 is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

FRANK B. GARY,
Defendant's Attorney.

Oct. 17th, 1901.–(Certificate.)

The presiding judge D. A. Townsend overruled the objection to the jurisdiction of the court and made the following order:—

(Title of the Cau-e.)

The defendant Western Supply Company through its attorney Frank B. Gary entered a special appearence for the purpose of objecting to the judgment in this case and demurs to the jurisdiction of this court on the ground that the said defendant is a foreign corporation has not been served with the summons in this State and has not been brought in the jurisdiction of this court and on the ground that subdivision 1 of section 155 of the Code of Civil Procedure of South Carolina, providing for service upon a foreign corporation and the act of the General Assembly of the State of South Carolina. amending the said section of the Code by striking
38 ou- the word 'resident' approved the 2nd of March 1899 are in contravention of the fifth and fourteenth amendments to the Constitution of the United States and on the further ground that the act of the General Assembly of the State of South Carolina entitled An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State.' ap-

proved the 2nd day of March A. D. 1897 is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The defendants offered affidavits which are herewith filed I am constrained to adopt the construction *palced* upin said statutes by the supreme court of the State and I hold that the acts and section of the Code referred to in the demurrer are not in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

I hold further that this court has acquired jurisdiction of the person of the defendant.

The demurrer to the jurisdiction of this court and the objection to this court rendering judgment are overruled.

D. A. TOWNSEND,
Presiding Judge.

October 7th, 1901.

39 The defendant thereafter had no further connection with the case.

The plaintiff then offered evidence tending to support the allegations of the complaint and the jury rendered a verdict for the plaintiff in the sum of $1,995.00 and judgment was duly entered up upon said verdict in accordance with law.

In due time the defendant gave notice of intention to appeal to the supreme court of the State from the order rulings of his honor, verdict of the jury and judgment entered thereon, and in the time prescribed by law served this case and the following exceptions:

1. Because his honor, the presiding judge erred in holding that the court of common pleas for Abbeville county had acquired jurisdiction of the person of the defendant, when it appeared that the defendant is a foreign corporation, had not come within the limits of South Carolina to do business, that the contract for the sale of the machinery was not made in South Carolina, by its terms was to be performed in Ohio, and that the only service of process made was upon a person in the State in no representative capacity, with no authority to bind the defendant in any way and only connected with the defendant as a travelling salesman to take orders for the sale of machinery subject to the approval of the defendant.

2. Because his honor the presiding judge erred in not holding that it was beyond the power of the State to enact a law that would authorize service of process upon any agent of a foreign corporation and thus b-ing such foreign corporation within the jurisdic-
40 tion of the courts of this State such a law being in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life or liberty or property without due process of law.'

3. Because his honor erred in holding that sub-division 1 of sec-

tion 155 of the Code of Procedure of South Carolina as amended by the act of the General Assembly of South Carolina approved the 2nd March 1899 is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States, in which amendments it is provided that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.'

4. Because his honor the presiding judge erred in holding that the act of the General Assembly of South Carolina, entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business in this State,' approved the 2nd March 1897 is not in contravention of the fifth and fourteenth amendme-ts to the Constitution of the United States. It is respectfully submitted that the said act and especially section 4 thereof, providing that 'it shall be a further condition precedent to the right of any such corporation to do business in this State that it shall be taken and deemed to be the fact irrebuttable, and part and parcel of
41 all contracts entered into between such corporation an- a citizen or corporation of this State, that the taking or receiving from any citizen or corporation of this State of any charge fee, payment toll impost, premium or other money or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State anything contained in such contract or any rules or by-laws of such corporation to the contrary notwithstanding,' abridges the privileges or immunities of citizens of the United States and deprives the citizens of their property without due process of law, and denies the equal protection of the law.

5. Because his honor the presiding judge erred in not holding that the defendant had not come within the limits of the State of South Carolina and that the summons in this case had not been served upon it in this State.

6. Because the presiding judge erred in not setting aside the service of summons and in not dismissing the complaint; and erred in allowing verdict to be rendered and the judgment entered in this case.

FRANK B. GARY,
Defendant's Attorney."

Written notice was given April 30, 1902 to defenda-t's attor-
42 ney, that plaintiff's attorney would, on the *the* printed record in this case and the record on file in this court upon the former appeal, move this court to dismiss this appeal on the ground that the rulings sought to be appealed from was *res judicata*, and had already been passed upon by this court in the former appeal.

This motion of plaintiff was heard along with this appeal of defendant.

From this statement it would seem, that the dec-sion of this court 61 S. C., 361 was, if not the law of the land, at least the law of this case on the question of the validity or invalidity of the service of the summons. It decided that the service of the summons was good and valid service by which defendant was b-ought within the jurisdiction of the circuit court. It gave defendant twenty days after service of the notice of the filing of the *remittitur* within which to serve answer, the full time allowed by the Code after service of summons and complaint. Defendant declined to answer, but objected to, and interposed a demurrer to the jurisdiction of the court on the grounds that defendant had not been brought within its jurisdiction by the service of the summons made, and that certain South Carolina statutory provisions named were in contravention of the 5th and 14th amendments to the Constitution of the United States, we are of opinion that when an objection to the jurisdiction based on the alleged illegal service of a summons has been made and overruled, no second objection based thereon can be admitted, however variant may be the specifications of the objec-
43 tions taken the first and second time from each other the same rule applicable to dilatory pleas, being applicable to such objections, at least in this regard "After any dilatory plea has been overruled, no second plea of the *same kind or class* can be admitted" Gould on Pleading page 227 "There must be an end of litigation somewhere and parties cannot be permitted *to try their cases by peice-meal*" Bleckeley *v.* Branyan 28 S. C. 450

A fortiori they cannot be permitted to try the disputed validity of the service of a summons by piece-meal.

The decisions of this court *was* conclusive not only of all objections based on the alleged illegality of service which were made but also of all objections based thereon which could have been made. Exe'rs of Tate *v.* Hunter 35 Strob. 139 McDowall *v.* McDowall Bail Eq. 330 Stoney *v.* Bank 1. Rich Eq. 276. Hibler *v.* Hancock 2 Strob. 107. 7 Rob. Pr. 13 Maxwell *v.* Connor 1 Hill Ch. 22.

"A demurrer on the ground that complaint does not state facts sufficient to constitute a cause of action when once taken and lost on certain specifications, showing wherein the complaint is defective cannot be renewed at any subsequent trial on the same or other specifications. This ground of demurrer is single and all specifications thereunder not made when heard are deemed *waived*." Turner *v.* Association 51 S. C. 36. We are therefore of opinion that the circuit judge was correct in holding in accordance with the previous decision of this court, that the circuit court had acquired jurisdiction of the defendant, and in overruling the demurrer to
44 the jurisdiction of the court, and the objection to the court's rendering judgment and that the judgment below must be affirmed It might be plausibly contended that a decision holding service of a summons to be good and valid involves in it the idea

that the same has been made by due process of law; but as we do not regard it necessary to the determination of the case to pass upon the constitutionality of the acts alleged to be in contravention of the Federal Constitution, the record presenting the other and clear ground above, on which this court rests its judgment, we decline to indicate any opinion as to the constitutional questions, resting our affirmance of the judgment below solely upon the grounds herein above stated. Cooley Con. Lim. 2 ed. 163 *Ex parte* Florence Schools 43 S. C. 15 Butler *v.* Ellerbe 44 S. C. 266

The judgment of this court is that the judgment entered in the circuit court upon the verdict for the plaintiff be affirmed.

I concur in the result only as I think the Federal question that appears in the record is satisfactorily disposed of, by the former opinion in this case.

EUGENE B. GARY, *A. J.*

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

45 [Endorsed:] The State of So. Ca. In the supreme court April term 1902 Abbeville Electric Light & Power Co. pl'ff, resp'd't, against Western Electrical Supply Co. def't, app'l't. Opinion. Le Roy F. Youmans, acting associate justice. We concur: Y. J. Pope A. J., Ira B. Jones A. J. I concur in the result. See within Eugene B. Gary A. J Filed 11th July, 1902.

Endorsed on cover: File No. 19,209. South Carolina supreme court. Term No. 178. Western Electrical Supply Company, plaintiff in error, *vs.* Abbeville Electric Light and Power Company. Filed January 20th, 1904. File No. 19,209.

(19,209)

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 178.

WESTERN ELECTRICAL SUPPLY COMPANY, *Plaintiff in Error*,

vs.

ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY, *Defendant in Error.*

In Error to the Supreme Court of the State of South Carolina.

STATEMENT OF PLAINTIFF IN ERROR.

This was a suit com nenced November 7, 1900, by defendant in error, a local corporation of South Carolina, against plaintiff in error, a corporation of the city of St. Louis, state of Missouri, for damages alleged to have been suffered on account of alleged failure in guarantee of a certain electric light machine furnished by plaintiff in error to defendant in error.

Service was attempted to be had by serving one Schminke, a traveling salesman of the plaintiff in error. A special appearance was entered by plaintiff in error objecting to the jurisdiction of the court, and a motion was filed to quash the service on the ground that the court had not acquired jurisdiction of plaintiff in error; such special appearance is proper under the practice in the state of South Carolina. The first affidavits filed by plaintiff in error in support of the motion to quash the service, stated that Schminke, at the time of the service, was not an officer of plaintiff in error, nor a director thereof; that he was simply a traveling salesman for it; that his duties and powers were solely to take orders for the sale of merchandise; that he was a resident of the city of New Orleans, Louisiana; that plaintiff in error had no office or place of business in the state of South Carolina; that Schminke was sent to the town of Abbeville, where the service was had, to examine into the running of the machine in controversy, and report the facts to the plaintiff in error at the request of defendant in error; that the contract between plaintiff in error and defendant in error, out of which the alleged cause of action arose, was not made in the state of South Carolina. (Record, page 13). Counter affidavits filed by defendant in error, simply identified certain letters passing between the parties, which, in effect, confirmed the surpose for which Schminke would be sent, i. e., to inquire into the trouble and reporting the results of his investigation to plaintiff in error. Nothing contained in these letters indicates that Schminke was to be given any power to settle the controversy (record, pages 15, 16, 17).

The trial court sustained the motion to quash and dismissed the cause. Upon appeal to the supreme court by defendant in error, that court reversed the trial court. The opinion of the court is found in 61 S. C. 361.

In that court the constitutionality of the statute authorizing the service was discussed at length and decided adversely to plaintiff in error.

The first opinion rendered, Abbeville C. L. & P. Co. vs. Western Electrical Supply Co., 61 S. C. 361, is based upon two grounds:

First—That because plaintiff in error had sold the machine in question to a South Carolina corporation and had received part payment on the same (although there was nothing in the affidavits to that effect), therefore, the courts of South Carolina were, under the statutes of that state, bound absolutely and "irrefutably" to hold that *the contract was made in and was to be performed in South Carolina*, and that *plaintiff in error was engaged in business in South Carolina*. From these premises the court drew the conclusion that plaintiff in error must be held to be engaged as a foreign corporation in business in that state, and service upon any agent was a valid service.

The statute quoted by the court to sustain this astounding and unconstitutional proposition are sections 4 and 5 of an act approved March 2, 1897, regulating foreign corporation acts of 1897, page 484, which reads as follows:

Section 4. . . . "It shall be taken and deemed to be the fact, irrebutable, and part and parcel of all contracts entered into between such corporation (foreign) and a citizen or corporation of this state;

that the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, import, premium, or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of any such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-law of such corporation to the contrary notwithstanding."

Sec. 5. That all such corporations hereafter doing business in this state, as defined in this act, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this act, and that such terms and conditions shall be deemed and taken in all the courts of this state to be a part and parcel of all contracts hereafter entered into between such corporations and a citizen or corporation of this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding.

Second.—That the service upon any agent, as authorized in section 155, R. S. of South Carolina, amended by act approved March 2, 1899, was not repugnant to the constitution of the United States and reviewing the cases in this court.

This section, as amended, so far as applicable, reads as follows:

. . . . . .

"The summons shall be served by delivering a copy thereof as follows: . . . Such service can be made in respect to a foreign corporation only when

it has property within the state, or the cause of action arose there, or when such service shall be made in this state personally upon the president, cashier, treasurer, attorney or secretary, or any agent thereof."

Upon the cause being remanded to the trial court, plaintiff in error again entered a plea to the jurisdiction, and filed affidavits similar to ones originally filed, and in addition the further fact was stated that plaintiff in error had never been engaged in business in the state of South Carolina, and that the contract in question was to be by its terms and actually was performed in the state of Ohio, and that it had a just and meritorious defense to the action.

The plea of plaintiff in error to the jurisdiction of the court specifically stated (record, p. 19), that its special appearance, the second time, was for the purpose of finally appealing to the Supreme Court of the United States. That section of 155 of the code of civil procedure of South Carolina, as amended March 21, 1899, providing for service upon foreign corporations, and "an act to further prescribe the terms and conditions upon which foreign corporations may do business within the state," approved March 1, 1897, are both in controvention of the fifth and fourteenth amendment to the constitution of the United States.

The trial court overruled the plea on the authority of the decision of the Supreme Court of South Carolina, and the plaintiff in error having refused to plead further, rendered judgment in favor of the defendant in error against plaintiff in error. An appeal was had to the Supreme Court of South Carolina, and that court heard the appeal, and after referring to the

affidavits filed, affirmed the judgment of the lower court on the ground that the matter was *res adjudicata*. Writ of error was then sued out by plaintiff in error to this court. The assignments of error are in brief: That the Supreme Court of South Carolina erred in holding that subdivision one of section 155 of the Code of Civil Procedure of South Carolina, providing for service of summons on a foreign corporation, as amended by the act of General Assembly of South Carolina, striking out the word "resident," approved the 2d day of March, 1899, and also the act of the General Assembly of South Carolina entitled "an act to further prescribe the terms and conditions upon which foreign corporations may do business," approved the 2d day of March, 1897, are not repugnant to the fifth and fourteenth amendments of the constitution of the United States.

A simple statement of the history of this case would seem to be sufficient to show that this court has acquired jurisdiction. Plaintiff in error could not appeal from the first decision of the Supreme Court of South Carolina because that was not a final judgment. It could not appeal to this court from the judgment of the trial court, because that court was not the court of last resort. It could appeal to the Supreme Court of South Carolina even though that court would affirm the judgment on the ground that the question was *res adjudicata*. Plaintiff in error followed the method prescribed by this court in Great Western Telegraph Co. vs. Burnham, 162 U. S. 339, and is here on the authority of that case.

That there is a constitutional question involved is equally plain. Though plaintiff in error is not, and

has not, been engaged in business in South Carolina, has no agent there, and although the contract in question was not performed there nor meant by its terms to be performed there, yet because it is a foreign corporation and has dared to sell a local corporation a machine, the law ofthat state compels its courts to hold that it is engaged in business there, and the contract was performed there and was to be performed there. This is a discrimination between citizens and non-residents with a vengeance. Is there any wonder that plaintiff in error was afraid to submit his defense when equal protection was not afforded to the non-resident corporation?

This court has gone far in upholding the jurisdiction of the state courts, but it has never gone to the extent of holding that a mere traveling salesman, inveigled into the state on a false pretext, is an agent with a representative capacity, as defined in Conn. Mutual Life Ins. Co. vs. Spratley, 172 U. S. 602.

We respectfully submit, therefore, that a constitutional question is involved and that plaintiff in error has adopted the proper method of bringing it before this court.

LEE W. GRANT,
RALSTON & SIDDONS,
For Plaintiff in Error.

(19,209)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 178.

WESTERN ELECTRICAL SUPPLY COMPANY, *Plaintiff in Error*,

vs.

ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY, *Defendant in Error*.

In Error to the Supreme Court of the State of South Carolina.

STATEMENT OF PLAINTIFF IN ERROR.

This was a suit commenced November 7, 1900, by defendant in error, a local corporation of South Carolina, against plaintiff in error, a corporation of the city of St. Louis, state of Missouri, for damages alleged to have been suffered on account of alleged failure in guarantee of a certain electric light machine furnished by plaintiff in error to defendant in error.

This cause has twice been before the District Court of Abbeville County, and twice before the Supreme Court of South Carolina.

Service of process was attempted to be had by serving one Schminke, a traveling salesman of the plaintiff in error, who was inveigled into the state by defendant in error for the purpose of getting service upon him, and through him upon plaintiff in error. A special appearance was entered by plaintiff in error objecting to the jurisdiction of the court, and a motion was filed to quash the service on the ground that the court had not acquired jurisdiction of plaintiff in error; such special appearance is proper under the practice of the state of South Carolina (record, p. 13). The affidavits filed by plaintiff in error in support of the motion to quash the service stated that Schminke, at the time of the service, was not an officer of plaintiff in error, nor a director thereof; that he was simply a traveling salesman for it; that his duties and powers were solely to take orders for the sale of merchandise; that he was a resident of the city of New Orleans, Louisiana; that plaintiff in error had no office or place of business in the state of South Carolina; that Schminke was sent to the town of Abbeville, where the service was had, to examine into the running of the machine in controversy, and report the facts to the plaintiff in error at the request of defendant in error; that the contract between plaintiff in error and defendant in error, out of which the alleged cause of action arose, was not made in the state of South Carolina (record, pp. 13, 14). Counter affidavits filed by defendant in error identified certain letters passing between the parties, which confirmed the purpose for which Schminke was sent, at the request of the defendant in error, *i. e.*, to inquire into the trouble and report the results of his investigation to plaintiff in

error. Nothing contained in these letters from plaintiff in error indicates that Schminke was given or was to be given any power to settle the controversy (record, pp. 15, 16, 17). The trial court sustained the motion to quash and dismiss the cause. Upon appeal to the supreme court by defendant in error, that court reversed the trial court.

In that court the constitutionality of the statute authorizing the service was discussed at length in the briefs of parties and in the opinion of the court, and decided adversely to plaintiff in error.

The first opinion rendered in Abbeville E. L. & P. Company vs. Western Electrical Supply Company, 61 S. C. 361, is based upon two grounds:

First.—That because plaintiff in error had sold the machine in question to a South Carolina corporation and had received part payment on the same (although there was absolutely nothing in the record proving, or tending to prove, part payment), therefore, the courts of South Carolina were, under the statutes of that state, bound absolutely and "irrebutably" to hold that the contract was made in and was to be performed in South Carolina, and that plaintiff in error was engaged in business in South Carolina. From these premises the court drew the conclusion that plaintiff in error must be held to be engaged as a foreign corporation in business in that state, and service upon *any* agent was a valid service.

The statute quoted by the court to sustain these astounding and unconstitutional propositions are sections 4 and 5 of an act approved March 2, 1897, regulating foreign corporations, acts of 1897, p. 484, which reads as follows:

"Section 4.— . . . It shall be taken and deemed to be *the fact, irrebutable, and part and parcel of all* contracts entered into between such corporation (foreign) and a citizen or corporation of this state; that the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, import, premium, or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of any such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding.

Section 5.—That all such corporations hereafter doing business in this state, as defined in this act, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this act, and that such terms and conditions shall be deemed and taken in all the courts of this state to be a part and parcel of all contracts hereafter entered into between such corporations and a citizen or corporation of this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding."

Second.—That the service upon *any* agent, as authorized in section 155, R. S. of South Carolina, amended by act approved March 2, 1899, was not repugnant to the Constitution of the United States, and reviewing the cases in the Supreme Court of the United States.

This act, as amended, so far as applicable, reads as follows:

"The summons shall be served by delivering a copy thereof as follows: . . . Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose there, or when such service shall be made in this state personally upon the president, cashier, treasurer, attorney or secretary, or any agent thereof."

Upon the cause being remanded to the trial court, plaintiff in error again entered a plea to the jurisdiction, and filed affidavits similar to ones originally filed, and in addition the further fact was stated that plaintiff in error had never been engaged in business in the state of South Carolina, and that the contract in question was to be, by its terms, and actually was performed, in the state of Ohio, and that plaintiff in error had had a just and meritorious defense to the action.

The plea of plaintiff in error to the jurisdiction of the court specifically stated (record, p. 19) that its special appearance was for the purpose of finally appealing to the Supreme Court of the United States; that section 155 of the code of civil procedure of South Carolina, as amended March 21, 1899, providing for service upon foreign corporations, and the act entitled "an act to further prescribe the terms and conditions upon which foreign corporations may do business within the state," approved March 1, 1897, are both in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The trial court overruled the plea on the authority of the decision of the Supreme Court of South Caro-

lina, and plaintiff in error, having refused to plead further, rendered judgment in favor of the defendant in error against plaintiff in error. An appeal was then had to the Supreme Court of South Carolina; that court heard the appeal, and, after referring to the affidavits filed, affirmed the judgment of the lower court on the ground that the matter was *res adjudicata*. Writ of error was then sued out by plaintiff in error to this court.

ASSIGNMENT OF ERRORS.

The Supreme Court of South Carolina erred in holding and deciding that Subdivision 1 of Section 155 of the Code of Civil Procedure of South Carolina, providing for service of summons upon a foreign corporation, and the Act of the General Assembly of South Carolina amending the said section of the Code of Civil Procedure by striking out the word "resident," approved the 2d day of March, 1899, and also the Act of the General Assembly of South Carolina entitled "An Act to Further Prescribe the Terms and Conditions upon which Foreign Corporations May Do Business," approved the 2d day of March, 1897, were valid.

The validity of said section of the Code of Procedure and Acts of the General Assembly were denied and drawn in question by the defendant below (plaintiff in error here) on the ground of their being repugnant to the Constitution of the United States and in contravention thereof.

The Supreme Court of South Carolina erred in holding and deciding:

First.—That the said acts and section of the Civil Code are not repugnant to or in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that no person shall be deprived of life, liberty or property without due process of law; and wherein it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Second.—That said section of the Code of Civil Procedure, and the said acts of the General Assembly, did not abridge the privileges and immunities of citizens or of this defendant as guaranteed by said fourteenth amendment, and that the said section of the Code of Civil Procedure and the said acts did not deprive citizens of this defendant of property without due process of law contrary to the provisions of said fifth and fourteenth amendments of the Federal Constitution (record, p. 4).

POINTS.

I.

Three conditions are necessary to give a court jurisdiction in *personam* over a foreign corporation: First, it must appear that the foreign corporation was *carrying on* its business in that state; second, that the business was transacted by some agent or officer appointed by or representing such corporation in such state; third, the existence of some local law making such corporation amenable to suit as a condition, express or implied, of doing business in the state.

United States vs. American Bell Telephone Co., 29 Fed. Rep. 17.

Mr. Justice Field states the rule in St. Clair vs. Cox, 106 U. S. 350, thus:

"It is essential in order to support the jurisdiction of the court to render a personal judgment against a foreign corporation that the corporation was *engaged in business* in the state, and that service of process was made upon its agent there. It could then be shown that the agent stood in no representative character to the corporation, that his duties were limited to those of a subordinate agent, or to the particular transaction, or that his agency had ceased."

To the same effect Goldey vs. "Morning News," 156 U. S. 518, and Conley vs. Mathieson A. Works, 190 U. S. 406.

These rules are quoted with approval by Mr. Justice Peckham in Mut. Life Ins. Co. vs. Spratley, 172 U. S. 602 (615) (618).

In this last case the question of representative character is treated (page 614) as follows:

"It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character of agent employed." And (page 617): "If it appear . . . . . that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference," etc.

In the Spratley case the agent had been employed a great number of years by the company as an adjuster with discretionary powers to adjust that particular claim.

In the case at bar, Schminke was a mere traveling salesman in the employ of plaintiff in error only for a short time to take orders subject to approval, who, while on a regular trip, was diverted from his regular route and sent to Abbeville to look into the complaint of defendant in error with instructions to report the facts to plaintiff in error. (Record, pp. 13, 14.) He had no general powers in any direction, and not even power to adjust this particular claim.

It is undisputed that the contract in question was not made in the state of South Carolina, as shown by the first affidavit filed by plaintiff in error, and if the second affidavit is considered, it is shown that the contract was, by its terms, to be, and actually was, performed in Ohio, by delivering the machinery to defendant in error there. Even if the order had been taken in South Carolina, it would not be a carrying on or doing business in the state of South Carolina.

Cooper Mfg. Co. Ferguson, 113 U. S. 727;

Delaware & Hudson Canal Co. vs. Mahlenbroch, 43 N. J. L.; 281
6 Thomp. Corp., Sec. 7936;
5 Am. & Eng. Enc. Law, p. 71;
8 Am. & Eng. Law, p. 346.

The second affidavit also stated that plaintiff in error was not and never had been engaged in business, nor had an office, nor an agent in the state of South Carolina. These facts are not disputed or denied by counter affidavit, nor, in fact, has it ever been contended by defendant in error that plaintiff in error was ever actually engaged in business in the state of South Carolina. These being the conceded facts, it therefore became necessary for the Supreme Court of South Carolina, in order to sustain the jurisdiction of the court over the plaintiff in error in this case, to construct some theory by which plaintiff in error, although not actually engaged in business there, could be held to be constructively engaged in business there. The course of reasoning by which the Supreme Court of South Carolina arrives, as it does, at its conclusion, is certainly remarkable and unique in the annals of judicial history. This is worked out in the following manner: The state of South Carolina has a statute, being an act approved March 2, 1897, regulating foreign corporations. (Acts 1897, p. 484.)

The parts of that act which are material to this inquiry are sections 4 and 5, which are as follows:

"Section 4.— . . . . It shall be taken and deemed to be the fact, irrebutable, and part and parcel of all contracts entered into between such corporation (foreign) and a citizen or corporation of this state, that

the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, import, premium or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of any such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding.

"Section 5.—That all such corporations hereafter doing business in this state, as defined in this act, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this act, and that such terms and conditions shall be deemed and taken in all the courts of this state to be a part and parcel of all contracts hereafter entered into between such corporations and a citizen or corporation of this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding."

This remarkable statute forms the premise upon which the court's opinion stands. It only remained, therefore, this premise being, as that court itself says, "irrebutable," for the court to be convinced that the Western Electrical Supply Company, a foreign corporation, had made a contract with defendant in error, which was admitted, and had received part payment, in order to enable the court to draw the conclusion that the Western Electrical Supply Company was doing business in the State of South Carolina, and that the contract had been made in that state and

was to be performed in that state. Neither the petition in the case nor the affidavits filed alleged that defendant in error had paid anything on account of the contract to plaintiff in error, nor did the affidavits contain anything which intimated that a payment had been made. This, however, did not trouble the Supreme Court of South Carolina, for that court, speaking through the chief justice, said they would simply "infer" that a payment had been made. Having, therefore, established this premise by virtue of the statute itself, and having established the next step by an inference founded upon nothing, the court then drew its "irrebutable" conclusion that plaintiff in error was doing business in the state of South Carolina; that the contract was made there, and was to be performed there. Having established this conclusion by such a course of reasoning, the court triumphantly concludes: "Under this view this case must be regarded as a case in which a domestic corporation having, as it supposed, a claim against a foreign corporation doing business in this state, arising out of a contract made and to be performed in this state, has undertaken to commence its action against such foreign corporation by serving, personally, within the limits of this state, an agent of such foreign corporation with a copy of the summons; and in such a case we do not think that any authority has been, or can be, cited which holds that the state court had not thereby acquired jurisdiction of the foreign corporation."

This court has gone further in the Spratley case to sustain the jurisdiction of the state court over foreign corporations than in any other case, because in that

case the insurance company had ceased to do business in the state of Tennessee, in the ordinary sense in which those words are used, because it was no longer soliciting contracts of insurance in that state, nor was it maintaining an office or agent there. The company had, however, for many years prior to that time actually maintained an office in this state, complying with the state laws in regard to insurance, and still had in force a great many contracts of insurance with citizens of that state, which had been taken out while it was actually engaged in business there, and was still receiving premiums from these policy-holders. The claim in question, on which suit was brought in that case, was based upon one of these identical policies. This court therefore held that while it was not actually engaged in business in the sense of soliciting new contracts or maintaining an office, yet it was engaged in business in the sense of continuing the old business, because it was receiving premiums from these policyholders. The representative character of the agent upon whom service was had was established to the satisfaction of this court, because he had for many years been employed by the company as an adjuster with discretionary powers, and was sent into the state this particular time for the express purpose of adjusting, with discretionary power, the claim in suit. It would readily be seen that there is a wide difference between facts of the Spratley case and those in the case at bar. Here plaintiff in error cannot be said to be doing business in the state of South Carolina except by a fiction of law founded upon an unconstitutional statute; further, the agent upon whom service has been had is

not a representative agent in any sense of the term, as he had only been employed a short time as a mere salesman, and had no discretionary power, either in this case or in any other.

As the plaintiff in error has not applied for permission to do business in South Carolina, or, in fact, done business there, it cannot be made to accept as a result of an act done outside of the state that which *might* be binding upon it, if it had accepted the conditions of doing business in the state, merely because the legislature of South Carolina has chosen to say that such a result shall follow. Neither the legislative fiat nor the decision of the courts of South Carolina are binding in this court on matters of service upon a foreign corporation.

Barrow S. S. Co. vs. Kan., 170 U. S. 100.

III.

The point is made in the motion to dismiss, that this court has jurisdiction because the decision of the Supreme Court of South Carolina, on account of which the writ of error is sued out, is based upon the doctrine of former adjudication. This is easily disposed of. Plaintiff in error could not appeal from the first decision of the Supreme Court of South Carolina, because that was not a final judgment. It could not appeal to this court from the last judgment of the trial court, because that court was not the court of last resort. It must appeal to the Supreme Court of South Carolina, even though that court would affirm the judgment on the ground that the question was *res adjudicata*. Plaintiff in error followed the

method prescribed by this court in Great Western Telegraph Co. vs. Burnham, 162 U. S. 339, and is here on the authority of that case.

Respectfully submitted,

LEE W. GRANT,
RALSTON & SIDDONS,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

WESTERN ELECTRICAL SUPPLY COMPANY,
Plaintiff in Error,

vs.

ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY, Defendant in Error.

No. 178.

Motion to Dismiss or Affirm and Brief in Support Thereof.

Comes now here Abbeville Electric Light and Power Company, the defendant in error, by Mr. Wm. N. Graydon, its attorney, and moves the Court as follows:

1. To dismiss in this cause the writ of error to the Supreme Court of South Carolina:

A. Because no Federal question was involved in the determination of the cause by the said Court, or entered into the judgment of the Court.

B. Because the judgment of that Court in this cause is fully sustainable independently of any claim set up by the plaintiff in error under the Constitution or laws of the United States.

C. Because no question in this cause was decided adversely to any right claimed by the plaintiff in error under the Constitution or laws of the United States.

2. To affirm in this case the judgment of the Supreme Court of South Carolina, because, if any question exists in the case of which this Court will take jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

And, in support of the motion thus made, the defendant in error submits the accompanying brief.

Wm. N. Graydon,
For Defendant in Error.

Take Notice, That on Monday, October 31st, 1904, at twelve o'clock M., or as soon thereafter as counsel can be heard, the foregoing motion will be called to the attention of the Court.

Wm. N. Graydon,
For Defendant in Error.

To Mr. Jackson H. Ralston, Counsel for Plaintiff in Error :

Service of the foregoing notice, together with a copy of the motion and the accompanying brief, is hereby acknowledged, this 5th day of October, 1904.

Jackson H. Ralston,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

WESTERN ELECTRICAL SUPPLY COMPANY,
Plaintiff in Error,

vs.

ABBEVILLE ELEBTRIC LIGHT AND POWER COMPANY, Defendant in Error.

Brief in Behalf of Defendant in Error.

Statement of the Case.

The defendant in error, Abbeville Electric Light and Power Company, a corporation chartered under the laws of South Carolina, and having its principal place of business in the City of Abbeville, brought suit for damages against the plaintiff in error, for breach of contract, in Abbeville County, South Carolina, for the sum of Nineteen Hundred and Ninety-Five Dollars.

The summons and complaint were served upon one George F. Schminke, an agent of the plaintiff in error, at Abbeville Court House, South Carolina, on the 7th day of November, 1900, and by the terms of the summons the plaintiff in error was required to answer the complaint within twenty days from the date of service, exclusive of the day of service.

Before the time for answering expired the plaintiff in error served on the attorney for the defendant in error, a notice that it would move to set aside the service of the summons upon the single ground that the party served, George F. Schminke, was not an agent of the said defendant, plaintiff in error. See Record, page 13.

The Circuit Court granted the motion to set aside the service of the summons upon the ground that the said Schminke was not such an agent as was contemplated by the Code of Procedure of South Carolina, governing such cases.

The Supreme Court of South Carolina reversed the judgment of the Circuit Court, and remanded the case, giving the defendant twenty days in which to answer the complaint. Record, page 18. See also 61 S. C. Reports, 361.

Within the time allowed by the Supreme Court of South Carolina to answer the complaint, the defendant, plaintiff in error, served a notice upon the plaintiff, declining to answer the complaint, and again attempting to set aside the service of the summons. The Circuit Court overruled the objection, and upon the verdict of a jury the plaintiff had judgment. From this judgment an appeal was taken to the Supreme Court of South Carolina, and that Court affirmed the judgment of the Circuit Court, upon the *sole* ground that the question was *res adjudicata*, and expressly declined to consider or pass upon the alleged Federal question. See Record, page 25.

From this judgment of the Supreme Court of South Carolina, the plaintiff in error applied for and obtained from the Chief Justice of the Supreme Court of South Carolina, a writ of error to this Court.

The assignment of errors by the plaintiff in error practically raises but one point, and that is that the Supreme Court of South Carolina erred in holding that the Section of the Code of Civil Procedure of South Carolina, Section 155, Sub-division 1, was not repugnant to or in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

A sufficient answer to that, is that the Court made no such ruling. On the contrary, it expressly refused to pass on the questions sought to be raised, on the ground that it was not necessary to a decision of the case.

This Court has often declared the conditions under which a writ of error will lie to bring before it for review the judgment of a State Court.

In the case of Harrison vs. Morton, 171 U. S., at page 47, this Court says: "It is settled law that, to give this

Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it."

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

DeSaussure vs. Gaillard, 127 U. S., 216.
Chemical Bank vs. City Bank of Portage, 160 U. S., 646.
Capital Bank vs. Cadiz Bank, 172 U. S., 425.
McQuade vs. Trenton, 172 U. S., 636.
Allen vs. Southern Pacific R. R. Co., 173 U. S., 479.
Beals vs. Cone, 188 U. S., 184.

The Supreme Court of the State expressly refused to pass on the alleged Federal question, and based its judgment on another and entirely different ground. The Federal question, therefore, is not involved at all in this case.

Can the judgment of the Supreme Court of South Carolina be sustained on other than a Federal ground? If so, this Court will not interfere.

The question decided by the Supreme Court of South Carolina is purely a local question. Each State has a right to declare the terms upon which foreign corporations shall do business in the State, and the doing of the business is an acceptance of the terms imposed by statute.

In the case of Simon vs. Craft, 182 U. S., 427, it is said:

"The proceedings in a State Court, in order to constitute due process of law under U. S. Constitution, 14th Amendment need not be by any particular mode, if they constitute a regular course of proceedings in which notice is given of the claim asserted, and an opportunity offered to defend against it." Quoted with approval in New Orleans Waterworks Co. vs. State of Louisiana, 185 U. S., 336. So far from being refused an opportunity to defend, the plaintiff in error was given ample opportunity to defend, but absolutely, without excuse, refused to avail itself of such privilege. See Record, page 7.

The Fifth Amendment to the Constitution contains no restriction on the powers of the State.

Brown vs. New Jersey, 175 U. S., 172.

In the case of Adams County vs. Burlington & Mo. R. R. Co., 112 U. S., 123, it is said: "To give us jurisdiction of a writ of error for the review of a judgment of a State Court, it must appear affirmatively, not only that a Federal question was raised, and presented for decision to the highest Court of the State having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. The cases to this effect are numerous."

The case of Chouteau & Maffit vs. Gibson, 111 U. S., 200-201, decides that where a Federal question was presented, but the Court based its judgment on the plea of *res adjudicata*, the writ of error would not lie. That case is very similar to the case at bar. This case is decided entirely upon the question of *res adjudicata*, as decided by previous decisions of the Supreme Court of South Carolina, and the common law, and no law of the United States affected the result. The judgment can be sustained entirely on other

than Federal questions, and the judgment below ought to be affirmed.

The defendant in error respectfully submits that this Court should not longer retain the case on its docket.

Wm. N. Graydon,
For Defendant in Error.

Supreme Court of the United States.

No. 178.—October Term, 1904.

Western Electrical Supply Company, Plaintiff in Error, *vs.* Abbeville Electric Light and Power Company. } In error to the Supreme Court of the State of South Carolina.

[April 3, 1905.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

The Abbeville Electric Light and Power Company, a corporation of South Carolina, brought this action in the Circuit Court of Abbeville County, South Carolina, against the Western Electrictal Supply Company, a corporation of Missouri, by service of summons and complaint on one George F. Schminke, as agent of the defendant. The complaint alleged that "the cause of action set forth herein arose in this State," and set up the breach of a contract of guaranty in respect of a machine for generating electricity sold by defendant to plaintiff. Defendant appeared specially and moved "to set aside the service of the summons herein on the ground that the party served with the summons and complaint herein on the seventh day of November, 1900, was not an agent of the defendant." The motion was heard on affidavits at the February term, 1901, of the Circuit Court, the service set aside and the case dismissed for want of jurisdiction.

The Circuit Judge was of opinion that Schminke was not "an agent in the sense in which 'any agent' is used in the Code." The case was then carried by appeal to the Supreme Court of South Carolina, and the judgment below was reversed and the cause remanded for further proceedings. 61 S. C. 361.

The court held, speaking through Mr. Chief Justice McIver, that under the second paragraph of section 155 of the Code, as amended by an act approved March 2, 1899, the facts being considered in connection with section 1466 of the Revised Statutes of 1893, as amended by an act of 1897, the service was good and valid.

In this view the court said: "The case must be regarded as a case in which a domestic corporation, having, as is supposed, a claim against a foreign corporation doing business in this State, arising out of a contract made and to be performed in this State, has undertaken to commence its action against such foreign corporation by serving, personally, within the limits of this State, an agent of such foreign corporation with a copy of

the summons; and in such a case we do not think that any authority has been or can be cited, which holds that the State court had not thereby acquired jurisdiction of the foreign corporation."

On the other hand, the court held that if the case were one in which the plaintiff, a domestic corporation, had brought its action on a contract not made, and not to be performed, in the State, against the defendant, a foreign corporation, and had undertaken to obtain jurisdiction by the personal service of the defendant's agent within the limits of the State, even then, as it appeared upon the facts that the agent was a representative of the defendant corporation in respect of the transaction out of which the suit arose, and was served while within the State for the purpose of attending to the business of the corporation, the service was a good service.

The case having gone back to the Circuit Court, defendant, by demurrer, renewed its objection to the jurisdiction, this time "on the ground that subdivision 1 of section 155 of the Code, providing for service upon a foreign corporation, and the act of the general assembly of South Carolina amending the said section of the Code, by striking out the word 'resident,' approved 2nd March, 1899, are in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States, and on the further ground that the act of the General Assembly of South Carolina, entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State,' approved the 2nd day of March, A. D. 1897, is in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States."

The demurrer was overruled and the case went to verdict and judgment on the merits, whereupon it was again taken by appeal to the Supreme Court. That court declined to express any opinion on the constitutional questions, and affirmed the judgment. 66 S. C. 328. The court held the question of jurisdiction had already been determined and that it was not bound to re-examine it. This was, of course, a ground broad enough to sustain the judgment, and as the objection that the State statutes were inconsistent with the Federal Constitution was not raised until the case came on for the second hearing, it is plain that the Supreme Court could, in its discretion, treat it as coming too late to call for decision. Had that objection been raised in the first instance and been disposed of, then inasmuch as the judgment of the Circuit Court was at that time reversed on plaintiff's appeal, the adherence by the Supreme Court to its prior adjudication as the law of the case, on defendant's appeal, would not in itself have cut off consideration of the Federal questions; but it was not so raised, and, as the case stands, we are of opinion that our jurisdiction cannot be maintained.

Writ of error dismissed.